

August 25, 2008

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REVISED REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **L07CU005**

T-MOBILE/KLACSON SITE
Conditional Use Permit Appeal

Location: 42121 – 102nd Street, North Bend, Washington 98045

Appellant: Margaret Kyle & Thomas Bindus, *et al*
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing opened:	June 4, 2008
Hearing closed:	June 4, 2008

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On February 12, 2008, the King County Department of Development and Environmental Services (DDES) issued both a Determination of Non-Significance (DNS) under SEPA and a Conditional Use Decision for the T-Mobile/Klacson Cell Tower application located at 42121 Southeast 102nd Street, north of the city of North Bend. The application site is a 70 foot by 70 foot leasehold located within a wooded area on the northern half of a 4.88 acre site situated in the Agricultural zone. A single-family house is sited on the southern half of the property. In addition to clearing for construction of the monopole site, the Applicant proposes to install a new driveway from the leasehold area north to Southeast 102nd Street.
2. The proposed facility is a monopole at a height of 150 feet supporting antenna arrays at the top. In compliance with code requirements, the Applicant has committed to allow other service providers to collocate at the 125 and 110 foot levels. The mounted antennas are proposed to extend six feet horizontally from the monopole tower, which is the maximum allowed by code. Taking into account the width of the monopole itself, a three antenna array would create a lateral span of approximately 14 feet. Although exact dimensions are not provided, a typical antenna shown on the Applicant's plans has a vertical dimension of about four feet eight inches. The mitigation of visual impacts provided by the February 12, 2008 Conditional Use Permit (CUP) Decision consists mainly of retention of nearby trees and painting the facility a brownish green color to blend into surrounding vegetation.
3. A group of neighborhood residents, represented by Margaret Kyle and Thomas Bindus, filed an appeal of the CUP Decision on February 28, 2008. No appeal was filed of the SEPA Threshold Determination. A prehearing conference on the appeal was held by the King County Hearing Examiner's Office on April 10, 2008 and a Prehearing Order was issued on April 11, 2008. Discovery was conducted by the parties in the form of written interrogatories and requests for production of documents and a public hearing on the appeal was held on June 4, 2008.
4. The primary issues raised within this appeal concern the visual impacts of the proposed monopole and antenna array on the Appellants and other nearby residents. If the application is approved, the Appellants have requested imposition of further mitigation measures, including reduction of the pole height and smaller antennas flush-mounted to the pole to reduce the area of visual impact. The Applicant, through its engineer, has offered testimony that the 150 foot height is the minimum necessary to meet its coverage requirements and that smaller antennas closer to the pole would decrease the facility's service capability. The Applicant's radio frequency site analysis shows the proposed monopole site lying within a locale of diminished coverage and identifies an area bounded by Southeast 102nd Street on the north, Southeast 108th Street on the south, 420th Avenue Southeast to the west and 428th Avenue Southeast to the east wherein the facility must be located in order to adequately serve the target area. The Applicant site is located near the northwest corner of this facility location ring. The Applicant investigated other properties within this service ring and engaged in serious negotiations with two of them. One property further south was rejected because setback requirements could not be met, and the vacant property adjacent to the Applicant site on its west was rejected on the basis of inability to agree to lease terms. Due to neighborhood layout and vegetation patterns, the site adjacent to the west would likely have had greater visual impacts on the residential properties of primary concern within the Circle River Ranch subdivision.

5. As noted above, the Applicant site itself is heavily wooded and the trees surrounding the proposed monopole tower will provide some visual buffering. The evidence is that there are onsite deciduous and conifer trees in the range of 50 to 75 feet tall. In addition, on the property west of the site there is a clump of Douglas firs, the largest of which is just under 100 feet tall. Their future preservation cannot be guaranteed within this proceeding, but the property is also designated Agricultural and cannot be further subdivided under current zoning. Moreover, as part of the much larger Mountain Meadows Farm holding to the north, it probably is not under immediate development pressure.
6. A major scenic attraction, Mt. Si, lies due east of the proposed cell tower site at a distance of approximately a mile-and-a-half. The scenic amenity is not really a single mountain so much as a mountain ridge that extends for about a mile along a north/south trajectory and rises up steeply from the valley floor. Most of the homes in the area, including those of the Appellants, are oriented to take advantage of the Mt. Si view. The Appellants who testified at the hearing described designing their houses to incorporate the mountain view, employing banks of large windows to maximize the view exposure. The residents most concerned with the visual effects of the proposed cell tower are of course those who live west of the proposed site and look past the tower at the Mt. Si viewscape. Their view includes both the rock face of the mountain ridge and the wooded slopes at the base of the ridge.
7. Regarding the visual impacts of the proposed cell tower on properties lying west of the site, the most useful evidence in the original record was a balloon study performed by T-Mobile, most likely in the latter part of 2006. A red balloon was tethered to 150 feet of rope and floated above the proposed cell tower site. While questions have been raised as to whether wind may have caused the balloon to drift off target, even with such potential defect the balloon study remains the most valuable evidence available on this issue. Photographs taken by T-Mobile from the Bindus/Kyle residence approximately 1060 feet to the west of the site, as well as from the neighboring Fabian/Rasmussen property to the south, show the balloon visible just above the line of intervening trees. Mr. Bindus's photograph from the second story of his residence (Exhibit 8) taken on the same day shows the balloon further above the trees. Although no photos were taken from the then-undeveloped Patton property immediately north of the Bindus/Kyle residence, one may infer from its similar orientation that the balloon would be visible from there as well.
8. The fact that there are 75 foot trees adjacent to the pole on the Applicant site does not lead automatically to the conclusion that the upper 75 feet of the pole will be visible from surrounding residences. The percentage of the structure that will be visible from any given point is determined not simply by the height of an intervening tree or structure, but also the distance of such tree or structure from the viewing point. For example, using the Bindus/Kyle residence as a model, at a distance of 700 feet from the viewing point a 100 foot tall tree would totally block the view of the 150 foot tower. The tree height necessary to obscure the tower decreases to 50 feet at 350 feet from the viewing point and to about 20 feet at 150 feet. In other words, the effectiveness of an intervening screening object increases as it moves closer to the viewing point.
9. Keeping these principles in mind, one must entertain some skepticism as to whether the cell tower as proposed would actually be visible from the Hevner residence approximately 750 feet from the cell tower location. Since a tree 60 feet in height at a distance of 300 feet or closer to the Hevner residence would be sufficiently tall to block the monopole from view, there is the possibility that the structure would not be visible. With respect to the Dalke property located some 1500 feet east (not west) of the site, the proposed cell tower clearly would not obstruct any view of Mt. Si.

10. Exhibit 23 is also instructive on another level. The photograph shows two power poles plus an array of power lines lying directly between the Salopek/Kaplan residence and the Mt. Si viewscape. When asked by the Applicant's attorney why he found these utility structures to be less objectionable than the proposed monopole, Mr. Salopek's reply was that these other similar structures were below the mountain, not in front of it. Or as he explained it, the view of value is upward, not downward.
11. To some degree, one can also apply this distinction between an unobstructed view of the mountain rock face itself and the view of the lower level greenery to the visual impacts at the Bindus/Kyle, Fabian/Rasmussen and Patton residences. In all three instances the monopole, if visible, will be seen against the greenery at the base of the mountain and not experienced as an obstruction to a view of the mountain itself. In the context of the vast expanse of the Mt. Si ridge, the monopole, to the extent it is visible, will lie below the ridge and, at distances of 1000 feet or more, occupy only a minor portion of the total viewscape.
12. In addition to reducing the facility's height below 150 feet or simply moving it someplace else, the Appellants have suggested other techniques for diminishing its visual impact. These include using smaller antennas, placing the antennas closer to the pole and using some sort of fake tree camouflaging kit. With respect to height reduction, altering the antenna array and relocation out of the area, the Applicant has demonstrated that its coverage objectives cannot be met with these changes. And, at this point at least, camouflaging appears to be an imperfect solution whose benefits do not justify the expense. The Applicant has offered to move the tower 50 feet further southeast on the same site, but Mr. Bindus' initial testimony suggested this is probably not far enough to make a difference.
13. After issuance of the Examiner's initial decision on June 10, 2008 Mr. Bindus had an opportunity to reevaluate his earlier testimony regarding the potential beneficial effects of moving the cell tower 50 feet further southeast on the Klacson property. Based on this reevaluation the Appellants moved for reconsideration of the Examiner's June 10, 2008 decision. Because it involved the introduction of new evidence the motion for reconsideration was treated by the Examiner as a motion to reopen the hearing record. An order for limited reopening of the hearing was issued by the Examiner on July 10, 2008 and authorized the submission of additional evidence by the parties regarding the net visual impact of moving the cell tower and whether the cost to the Applicant of such action would outweigh the benefits to the Appellants. The July 10, 2008 order also left open the question of whether further oral testimony would be required. No party has requested further oral testimony and the documentary record appears adequate to resolve the issues outstanding.
14. The Appellants performed a new balloon test on July 28, 2008 employing a 13 foot wide balloon at a height of 150 feet located first at the Applicant's proposed location for the tower and then at a location 50 feet to the southeast. The Applicant's attorney was also present at the time of the balloon test and took his own photographs. The photographs taken by Mr. Bindus demonstrate that the balloon is slightly better screened by intervening trees at the southeast location than at the Applicant's original location. The pictures taken by Mr. Bindus are from his property and from the Patton residence adjacent to the north. In all of Mr. Bindus's photos moving the tower slightly to the south shifts the balloon location toward a large clump of trees instead of a gap between the trees.
15. More dramatic screening effects are demonstrated by the pictures taken by Martha Fabian. From the Fabian/Rasmussen property directly south of the Bindus residence moving the tower location to the southeast places the otherwise visible tower top directly behind a large tree. Moreover, regarding views from the Salopek/Kaplan residence which lies much closer to the tower site, Ms. Fabian's photographs show that moving the tower further south provides a substantial visual

benefit. In its originally proposed location the cell tower is plainly visible above the distant tree line just north of a taller intervening tree. With a move further south the larger intervening tree completely screens the cell tower from the Salopek/Kaplan viewscape.

16. T-Mobile's objections to moving the tower 50 feet southeast of its originally proposed location are largely monetary in nature. The Applicant estimates that the cost of redesigning the project with attendant new geotechnical and soil studies and a further road extension will come to about \$14,500. T-Mobile asserts that the new location will have a greater impact on the host Klacson residence but offers no proof to support this contention. T-Mobile does not claim that the relocation will have an adverse service impact, and the proposed location of the tower near the northwest quadrant of its service ring suggests that the effect of a slight move to the southeast is more likely to be beneficial than harmful.

CONCLUSIONS:

1. In the context of evaluating visual impacts of monopoles within SEPA appeals, past King County Hearing Examiner cases have generated the following standard:

In the review of monopole applications for minor communications facilities within King County, the rule that has been consistently applied in Hearing Examiner proceedings has been that no significant aesthetic impact occurs unless a valuable view is impaired. This means that the mere fact that a tower may be visible from neighboring properties does not constitute in itself a significant adverse impact. Because monopoles are thin structures that do not normally produce major blockage, they do not have a significant adverse impacts unless a view of specific importance is impaired or the facility is so close to the viewer that it dominates the perspective. *US West/Lake Sammamish Parkway Site*, L97AC032, April 3, 1998.

Even though this is not a SEPA appeal, the analysis of visual impacts in the current proceeding involves largely the same elements, except that unlike in a SEPA appeal a finding within the Conditional Use review that an adverse visual impact exists cannot by itself be deemed conclusive of the ultimate issue.

2. Although the monopole site is sufficiently distant from neighboring properties to its west that the proposed facility will not dominate the perspective and therefore produce a major blockage, Mt. Si is a view of specific importance that is worthy of protection.
3. Based on the record, the level of visibility of the monopole from neighboring properties to its west will not be so substantial that denial of the application is warranted under King County's conditional use permit standards. That is, the distance of the facility from neighborhood residences, the existence of intervening trees that will screen most of the tower, the vast extent of the Mt. Si viewscape and the intrusion of the tower only upon the forested lower flanks of the slope all combine to limit the impact to a level that cannot be fairly described as incompatible with the character and appearance of existing nearby development or which discourages the permitted use of neighboring properties.
4. For better or worse, the King County Code does not look unfavorably upon cell tower construction. The code and the underlying Comprehensive Plan both recognize that these communication facilities have an important social and economic role to play. The code seeks to moderate impacts and to discourage unnecessary proliferation of facilities within the framework of allowing providers to meet their legitimate service needs. There is nothing in the record that suggests that the proposed T-Mobile facility is either superfluous or extravagant in its

dimensions. The code language simply does not support restricting needed service capacity to achieve aesthetic goals. Rather, it seeks to authorize service capacity as needed, while mitigating impacts in a way that does not compromise technical requirements.

5. A question of legal interpretation has arisen as to whether the provisions of KCC 21A.26.340 apply to the T-Mobile application. We believe that they do apply. The operative language of the section requires consideration of "the following criteria...when reviewing applications for new free-standing towers and determining appropriate levels of mitigation". That is precisely what is happening here. Within the context of the KCC 21A.26.340 criteria, the retention of existing trees that screen the site needs to be maximized, the silhouette of the tower extending above the height of the surrounding trees needs to be minimized to the extent feasible and reduction of the height of the existing tower needs to be considered within the context of providing the level of coverage needed. The conditions attached to this permit have been modified to strengthen the tree coverage retention requirement and to assure that future collocation of facilities will not exceed the 125 foot height limit specified in the application. The Applicant has demonstrated through technical studies that the tower height proposed is required to meet its coverage targets.
6. This brings us finally to the question of whether the cell tower facility should be relocated 50 feet further southeast as requested by the Appellants within the reopened hearing proceeding. KCC 21A.26.330 B. requires that transmission support structures "be designed to blend with existing surroundings to the extent feasible". One of the methods specified by the code section is the use of "alternative site placement to allow the use of topography, existing vegetation or other structures to screen the proposed transmission support structure from adjacent lands. . ."
7. The question of feasibility is largely a matter of site availability and service impairment. The alternative site location proposed by the Appellants is on the host Klacson site and no suggestion has been made that it is unavailable to the Applicant. In like manner the Applicant has made no claims as to service impairment resulting from the proposed relocation and the logic of its service coverage mapping suggests that such would not be an issue. While no setback issues have been raised, KCC 21A.26.330 C provides authority to waive setback requirements' the conditions will be modified to allow DDES to exercise that authority if required.
8. The visual benefits of relocating the cell tower as requested by the Appellants are only moderate with respect to Bindus and Patton properties. But the visual benefits of relocating the tower are significantly greater at the Salopek/Kaplan and Fabian/Rasmussen properties. These more substantial benefits outweigh the attendant burden on the Applicant and are sufficient to justify invocation of the authority conferred by KCC 21A.26.330 B to require the tower relocation as a condition of permit approval.

DECISION:

The appeal is GRANTED but the conditions of permit approval are modified on reopening to require placement of the cell tower 50 feet southeast of its originally proposed location.

ORDER:

The CUP is hereby granted, subject to the following conditions:

1. a. Development shall be generally in accordance with the proposal as discussed within this report, CUP application and the full size drawing received December 19, 2007 (attached is a reduced Site Plan received February 22, 2007), except that such plans shall be revised to relocate the tower 50 feet southeast of the originally proposed construction site.

- b. Minor revisions to plans are permitted to assure compliance with County Codes and conditions of this approval. This includes DDES authority to waive setback requirements pursuant to KCC 21A.26.330 C to effect relocation of the tower and to achieve greater screening.
2. A building permit shall be issued within one year from the date of final decision on this application. Otherwise, this action shall become null and void. Completion of construction must comply with the time frames found in KCC 21A.26.350.
3. The applicant shall file a letter agreeing to allow collocation on the tower with the department in conjunction with application for building permit. The agreement shall commit the applicant to provide, either at a market rate cost or at another cost basis agreeable to the affected parties, the opportunity to collocate the antenna of other service providers on the applicant's proposed tower to the extent that such collocation is technically and structurally feasible for the affected parties.
4. No further modifications to increase the height of the tower above 150 feet shall be permitted. This limitation is not meant to preclude multiple service providers from collocating on the proposed tower, nor preclude a future request for CUP approval to extend tower height under the CUP process which allows for public review for issues of compatibility. No future antennas shall be collocated on the tower under authority of this permit above the 125 foot level.
5. Any antennas mounted on this tower shall not extend more than six feet horizontally from the monopole tower to which it is attached.
6. The support structure, antennas, and all exterior mounted equipment shall be painted a dark green-brown to decrease the visual presence of the tower. This painting shall be done at the time of equipment fabrication, not at the cell site.
7. Except as otherwise authorized herein, existing trees on the site north of the semi-circular drive shall be retained. The site plan, and detailed site plan as part of building permit approval, must clearly identify the trees to be removed and specify that all other trees are to remain. Tree removal is allowed to construct the 12 foot wide access driveway and the 40 foot by 40 foot fenced compound as shown on the approved CUP plans; provided that, no trees above 35 foot height shall be removed for driveway construction.
8. The applicant shall install sufficient back-up power capable of providing a minimum of eight hours of back-up power supply to the base station. The applicant shall demonstrate that the battery back-up will be properly contained to reduce the potential for ground contamination.
9. Any noise generated by this proposal shall be in conformance with the provisions contained in King County Code Title 12. As recommended as Option 2 in the Acoustical Report, the applicant shall create a solid noise barrier around the equipment only with the necessary maintenance clearances. The noise barrier should be constructed from continuously solid material with a surface weight of 2.5 pounds per square foot (3/4" plywood or 16-gauge sheet-metal meets this requirement). There should be no gaps or joints in the noise barrier. The inside of the noise barrier should be lined between 1' and 5' above grade with sound absorbing Quash rigid foam board 2" thick.
10. Should any of these communications facilities and transmission structure no longer be used for communication transmission in the future, the applicant shall obtain permits as required for removal of all associated facilities no longer in use. Removal of structures shall occur within one year from elimination of operation on the site.

11. The civil engineer is proposing to address the flow BMP requirements with a native vegetative flow path on-site. A declaration of covenant must be filled out, signed, notarized and recorded by the owner of the property for the proposed flow control BMP. The covenant will restrict future construction over the flow path area.
12. An asphalt concrete apron is required for the driveway from the edge of the King County road (Southeast 102nd Street) to the right-of-way/property line of Southeast 102nd Street. Either show on the plan an existing asphalt paved apron or a plan and details for constructing an apron. Include a detail and section view similar to King County Road Standard Figure 3-003, "Shoulder and Ditch Section Driveway".

ORDERED this 25th day of August, 2008.

Stafford L. Smith
King County Hearing Examiner *pro tem*

NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within 21 days of the issuance of this decision. The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.

MINUTES OF THE JUNE 4, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L07CU005

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Chad Tibbitts, representing the Department; Kirk Wines, representing the Appellants; Thomas Bindus and Margaret Kyle, the Appellants; Larry Smith representing the Applicant; Joe Blashkey, Jr.; Martha Fabian; Robert Salopek; Rosalyn Kaplan; Yvonne Dalke; Michael Patton; Kevin Durning; Michael Slotemaker and Dr. Robert Hevner.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES' Report and Decision for L07CU005
Exhibit No. 2	Determination of Non-Significance issued February 12, 2008
Exhibit No. 3	DDES file L07CU005
Exhibit No. 4	Map of subject area
Exhibit No. 5	Map of subject area depicting subject property and Appellants' properties
Exhibit No. 6	Photograph taken from inside Bindus property depicting view of subject location of cell tower
Exhibit No. 7	Photograph taken from inside Bindus property depicting view of subject location of cell tower
Exhibit No. 8	Photograph taken from inside Bindus property depicting T-Mobile's balloon test
Exhibit No. 9	Photograph taken from inside Bindus property depicting T-Mobile's balloon test
Exhibit No. 10	Photograph depicting other cell tower
Exhibit No. 11	Photograph depicting other cell tower

Exhibit No. 12	Photograph depicting other cell tower
Exhibit No. 13	Photograph depicting other cell tower
Exhibit No. 14	Photograph depicting other cell tower
Exhibit No. 15	Photograph depicting Bindus cell phone range test
Exhibit No. 16	Photographs taken from Bindus property depicting balloon test
Exhibit No. 17	Photographs taken from inside Bindus property depicting view of proposed location of cell tower
Exhibit No. 18	Photographs taken from inside Bindus property depicting view of proposed location of cell tower
Exhibit No. 19	Photograph depicting alternative cell tower design
Exhibit No. 20	Photograph illustrating possible location error during balloon test
Exhibit No. 21	Photograph of Mt. Si viewscape
Exhibit No. 22	Photograph of Mt. Si viewscape
Exhibit No. 23	Photograph taken from Salopek property toward cell tower
Exhibit No. 24	Photograph depicting alternative cell tower configuration
Exhibit No. 25	Photograph taken from Patton property toward cell tower
Exhibit No. 26	Photograph taken from Patton property toward cell tower
Exhibit No. 27	T-Mobile's Radio Frequency Engineer Site Analysis
Exhibit No. 28	List of T-Mobile cell towers located in Washington that are at heights of 150 feet and above
Exhibit No. 29	Photograph depicting view of proposed cell tower location
Exhibit No. 30	Photograph depicting view of proposed cell tower location
Exhibit No. 31	Photograph depicting view of proposed cell tower location
Exhibit No. 32	Photograph depicting view of proposed cell tower location
Exhibit No. 33	Photograph depicting view of proposed cell tower location
Exhibit No. 34	Photograph depicting view of proposed cell tower location with mock up of cell tower inserted
Exhibit No. 35	Photograph depicting view of proposed cell tower location
Exhibit No. 36	Not admitted
Exhibit No. 37	Photographs depicting image of cell tower superimposed over red balloon used during balloon test (two images on the right of the page not admitted into the record)

New exhibits admitted as of date of revised report pursuant to reopened hearing record:

Exhibit No. 38	T-Mobile's Submission in Opposition to Appellant's Request to Move Cell Tower 50'
Exhibit No. 39	Appellant's declarations and exhibits in support of request
Exhibit No. 40	T-Mobile's Reply Brief
Exhibit No. 41	Appellant's Response

SLS:gao
L07CU005 RPT2